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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner

IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ARBITRATION PURSUANT TO SECTION 252(b) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996, AND THE APPLICABLE STATE LAWS FOR RATES, TERMS, CONDITIONS OF INTERCONNECTION WITH QWEST CORPORATION	DOCKET T-03654A-05-0350 T-01051B-05-0350

Arizona Corporation Commission
DOCKETED
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QWEST CORPORATION'S APPLICATION FOR REHEARING AND MODIFICATION OF DECISION

Pursuant to Arizona Revised Statutes § 40-253 and A.A.C. § R14-3-111, Qwest Corporation ("Qwest") hereby files its Application for Rehearing and Modification of the Opinion and Order in Decision 69176, entered in this docket by the Arizona Corporation Commission ("Commission") on December 5, 2006 ("Decision 69176").

PROCEDURAL BACKGROUND

In order to place this Application into its proper context, it is necessary to briefly review the pertinent procedural steps and Commission decisions that have brought this case to this point:

On April 7, 2006, Administrative Law Judge Jane Rodda issued her Recommended Opinion and Order ("First ROO"). The First ROO stated:

> The disputes that lead to this Petition for Arbitration primarily arise from Level 3's desire to employ an arrangement known as VNXX to serve its customers, comprised mostly of Internet Service Providers ("ISPs") and Voice over Internet Protocol ("VoIP") providers. The use of VNXX leads to issues of intercarrier compensation for these calls and how to allocate network costs between carriers. VNXX, or "virtual NXX", is an arrangement under which a CLEC assigns an NPA/NXX (telephone number area code and prefix) to a customer that is not physically located in the rate center or exchange with which that NPA/NXX is associated. The effect of VNXX is that the call is rated as a local call even though the called party is not physically located in the same local calling area as the calling party. (First ROO at 3-4)

As further explained by the First ROO, one of the primary issues is whether the FCC's *ISP Remand Order*[1] requires Qwest to pay $0.0007 per minute of use ("MOU") for calls made to ISPs using VNXX. Qwest asserted that the scope of the *ISP Remand Order* was limited to local ISP traffic, where the calling party and the ISP are physically located within the same local calling area ("LCA"). However, the Commission specifically did not decide that question in Decision 68817, because the Commission forbade the use of VNXX arrangements:

> Consistent with our understanding of federal law, our existing rules and our holding in the AT&T Arbitration Order, we decline to alter a long-standing regime for rating calls. Level 3 proposes the use of VNXX arrangements that undermine that compensation regime. Thus we find that Level 3 should not use VNXX to provide service to ISPs and VoIP providers. (*Id.* at 28-29).
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> ....
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> Because we do not permit the use of VNXX arrangements as Level 3 has proposed them in this case, we do not reach the issue of whether the ISP Remand Order only applies to "local" ISP traffic. (*Id.* at 29)

On April 24, 2006, both Qwest and Level 3 Communications LLC ("Level 3") filed Exceptions to the First ROO.

On June 27, 2006, the Commission held an Open Meeting. The Commission did not accept the amendments to the First ROO proposed by Qwest and Level 3. Instead, the Commission adopted the First ROO in total, but added four new paragraphs into the ordering

[1]Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001)("*ISP Remand Order*").

provisions of the First ROO (the "Mayes Amendment"). The key elements of the Mayes Amendment were (1) to order the parties to negotiate an interim replacement for VNXX referred to as "FX-like traffic," noting that such traffic will be routed over a direct end office trunk ("DEOT") which shall be paid for by Level 3; (2) to order that terminating compensation for such "FX-like traffic" would be paid at $.0007 per MOU; (3) to order Level 3 to "cease using VNXX" within 60 days; and (4) to order that the interim use of "FX-like traffic" was to continue until the Commission "issues a decision resolving the issues concerning the use of VNXX." (Decision 68817 at 82). Other than the foregoing additions to the ordering provisions, no other changes were made to the First ROO. The Mayes Amendment contained no definition of the term "FX-like traffic" nor did the original ROO.

On June 29, 2006, the Commission issued its order in this matter, Decision 68817, which provides no definition of "FX-like traffic."

On July 19, 2006, Qwest filed its original "Application for Rehearing and Modification of Order." On the same date Level 3 filed its "Application for Rehearing." The Commission issued no order on either Qwest's or Level 3's rehearing applications and they were, therefore, denied as a matter of law.

The parties were unable to successfully negotiate language to implement the "FX-like traffic" portion of Decision 68817. Thereafter, following a procedural conference, the Commission Staff offered to assist in mediating the matter. As a result, numerous meetings, calls, and other communications continued over the next several weeks.

On September 7, 2006, the Ninth Circuit Court of Appeals entered its decision in *Verizon California v. Peevey*, 462 F.3d 1142 (9th Cir. 2006) ("*Peevey*").

While negotiations continued, on September 22, 2006, Qwest filed a Motion to Allow Additional Briefing related in particular to the impact *Peevey* on the issues in this arbitration docket. In its motion, Qwest pointed out that the *Peevey* decision made rulings that raise fundamental questions as to whether the "FX-like traffic" order is lawful under federal law.

Given that the interconnection agreement in this matter had not then been finalized and given the authoritative impact of *Peevey* to outstanding issues (since Arizona is in the Ninth Circuit), Qwest sought the opportunity for the parties to brief the impact of *Peevey* on the issues in this docket.

While Qwest did not concede the legality of the FX-like traffic requirement, Qwest nonetheless negotiated in good faith in an effort to implement the requirements. Ultimately, the parties were unable to agree on language to implement the "FX-like traffic" portions of that order.[2]

After the parties reached an impasse on language to implement Order 68817, a Procedural Conference was held on October 3, 2006, at which time the Staff distributed amendatory language, including the language of section 7.2.2.1.7.6 (the section to which Qwest would not agree). At the Procedural Conference, Qwest argued that, given the fact that no factual evidence had been presented on the types of traffic and network re-configurations that would result in "FX-like traffic," both factual and related legal issues remained unresolved that required testimony, a hearing, and briefing.[3] Level 3 opposed the filing of testimony, holding an evidentiary hearing, and further briefing.[4] Staff agreed with Level 3 regarding testimony and a hearing, but did suggest that briefing would be appropriate.[5]

On November 7, 2006, Judge Rodda issued a second Recommended Order ("Second ROO"), which denied Qwest's request for the filing of testimony, for hearing, and for briefing,

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[2] Qwest made it clear throughout the process that its position was that the "FX-like traffic" portion of the order was both vague and unlawful. To that end, Qwest insisted that one paragraph of the new language include a non-waiver, reservation of rights provision, which is included in the language as section 7.2.2.1.7.10. Thus, even if the parties had been able to reach full agreement, Qwest never conceded that the "FX-like traffic" requirements of Decision 68817 were lawful. Qwest, therefore, expressly reserved its right to appeal that portion of Decision 68817. *See also* footnote 6, *infra.*

[3] Qwest claimed that briefing should address (1) factual and legal issues regarding the "FX-like traffic" issue and (2) legal issues related to whether an "FX-like traffic" approach was compliant with governing federal law in the Ninth Circuit. *Procedural Conference Transcript* (October 3, 2006) at 6-8, 12-13, 15, 24-25, 30-31.

[4] *Procedural Conference Transcript* at 9, 18-21.

[5] *Id.* at 12.

and which accepted the language proposed by Level 3 and Staff for implementation of the "FX-like traffic" portion of Decision 68817. The language adopted for implementation of the "FX-like traffic" order makes it clear that its implementation of the amended language does not constitute Qwest's agreement that it is lawful in this docket or in any other docket.[6]

On November 16, 2006, Qwest filed exceptions to the Second ROO.

At the Commission's open meeting on November 22, 2006, the Commission voted to adopt the Second ROO as written.

On December 5, 2006, the Commission issued Decision 69176, wherein it adopted the Second ROO as written. In Decision 69176, the Commission holds that Level 3 should be allowed to continue using VNXX type arrangements. (Decision 69176 ¶ 22). Further, the Commission rules that "FX-like" did not mean that it should be comparable to FX. (*Id.*). The Commission found that Decision 68817 does not require Level 3 to make any changes to its network in the interim period. (*Id.* ¶ 21). Thus, Level 3 may continue to use its VNXX type arrangements, and because those arrangements are now equated to "FX-like," the net result is that Qwest must pay to Level 3 compensation on interexchange ISP traffic.

On December 19, 2006, Qwest filed, under protest and with a reservation of rights, an interconnection agreement that complies with Decision 68817 and Decision 69176 for approval by the Commission. Qwest's filing of the compliant interconnection agreement was not a waiver of any of its claims of error in either order.

REQUEST FOR REHEARING

In its July 19, 2006 Application for Rehearing and Modification of Order relating to

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[6] Section 7.2.2.1.7.10 states: "Qwest has negotiated this arrangement under protest to comply with the Commission's Order which requires the Parties to implement and interim 'FX-Like' arrangement pending the resolution of the Generic VNXX Docket. By implementing the foregoing arrangement related to 'FX-like Traffic' neither Party waives its right to advocate in the Commission's Generic VNXX Proceeding or any other proceeding (including an appeal), positions inconsistent with the interim arrangements herein." Second ROO, Ex. A, at 2, ¶ 10.

Decision 68817 Qwest raised four general issues: First, Qwest asserted that the Commission erred in failing to specifically rule that the only calls subject to the compensation regime of the *ISP Remand Order* are calls that originate and are delivered to an ISP located in the same local calling area ("LCA") as the originating caller. (Qwest Application for Rehearing at 3-9). Second, Qwest claimed that the Commission erred in failing to include Qwest's proposed sections 7.1.1.1 and 7.1.1.2 relating to VoIP certification and audits. (*Id.* at 9-10). Third, Qwest asserted that the Commission had made a technical error in inadvertently excluding sections 7.2.2.9.3.1 and 7.2.2.9.3.1.1. (*Id.* at 10-11). Qwest proposed specific language changes to correct these errors, none of which were adopted. Finally, with regard to the "FX-like traffic" provisions of the order Qwest noted that the term is not defined but "must be read consistently with the other provisions of the ICA adopted in the *Commission Order*. Furthermore, consistent with its name, an 'FX-like' service must be consistent with and like FX service." (*Id.* at 12). Because the parties commenced negotiations of the "FX-like traffic" order, no final ICA was adopted. Given that a final ICA has not been finalized, Qwest reaffirms the foregoing issues and seeks correction of them by adopting the proposed amendments to Decision 68817 in Qwest's July 19, 2006 Application for Rehearing as Attachments A, B, and C.

Additionally, Decision 69176 contains additional errors for which Qwest hereby seeks rehearing. Specifically, Qwest seeks rehearing and modification of the following portions of Decision 69176:

1. Decision 69176 and the language adopted by the Commission to implement the "FX-like traffic" ordering provisions of Decision 68817 (attached as Exhibit A to Decision 69176) unlawfully reverse the clear prohibition of VNXX traffic in Decision Nos. 68817 and 68855 and thus sanctions a service the Commission found unequivocally to violate the law of Arizona relating to call rating.[7] The Commission's approval of

[7]Order 68855, *Level 3 Communications v. Qwest Corporation*, Docket Nos. T-01501B-05-0415 & T-03654A-05-0415 at 15 (July 28, 2006).

Exhibit A to Order 69176—the contract language to implement its "FX-like traffic" ruling (including, for example, the Commission's approval of the concept of a "virtual POI" in a LCA)—is likewise unlawful and is inconsistent with Arizona call rating rules, the *ISP Remand Order*, and federal law. The "FX-like traffic" language defines a service that is exactly the same as VNXX, as defined in Decision 68817 and in Decision 69176. Thus, the effect of Decisions 68817 and 69176 is to simultaneously prohibit and approve VNXX traffic.

2. By permitting Level 3 to continue using VNXX but calling it "FX-like," the Commission effectively subjects Qwest to liability for payment of ISP terminating compensation for VNXX traffic, despite the holding in Decision 68817 that the Commission did not reach the issue of whether the *ISP Remand Order* requires such payment. In so ruling, the Commission did not consider the binding federal circuit cases on that issue that rule that the *ISP Remand Order* applies only to local ISP traffic.

3. By denying Qwest the opportunity to present evidence on the meaning of the term "FX-like traffic," to a hearing on that issue, and an opportunity to brief that issue, Order 69176 denies Qwest's due process rights.

4. By refusing to allow Qwest and the other parties to brief the impact of *Verizon California v. Peevey*, 462 F.3d 1142 (9th Cir. September 7, 2006) ("*Peevey*"), a decision of the Ninth Circuit Court of Appeals, the Commission abrogated its responsibilities under the Act to apply current federal law to an ongoing, unresolved dispute under the Federal Telecommunications Act of 1996 (the Act). In so doing, the Commission also denied Qwest's right to due process and to have this matter resolved pursuant to current federal law.

5. Qwest's substantive rights under the Act have likewise been violated by the Commission because Decision No. 69176 in effect orders Qwest to pay ISP terminating compensation on VNXX traffic. The body of law that has been described by Qwest in

its earlier filings,[8] and stated below, compels the conclusion that the *ISP Remand Order* applies only to ISP traffic that is originated and delivered to a CLEC customer physically located in the same LCA.

6. Finally, Decision No. 69176 constitutes unlawful retroactive ratemaking and also violates Arizona law because it sets rates for interexchange ISP traffic without conducting a fair value determination as required by the Arizona Constitution.

I. ARGUMENT

A. Decision 69176 is Unlawful Because it Contravenes and Implicitly Reverses the Prohibition of VNXX Traffic in Decision Nos. 68817 and 68855.

In Decision 68817, the Commission undertook a detailed analysis of VNXX, correctly defining it as "an arrangement under which a CLEC assigns an NPA/NXX . . . to a customer that is not physically located in the rate center or exchange with which that NPA/NXX is associated." (Decision 68817 at 4, lines 1-4). The effect, according to the Commission, "is that the call is rated as a local call even though the called party is not physically located in the same local calling area as the calling party." (*Id.*). Later, the Commission stated that one of the problems with VNXX is "that it departs from the historic concept of local calling areas as the determinants of whether calls will be rated as local (no extra charge) or toll (subject to access charges)." (*Id.* at 25, line 25-26, line 1). That "historic concept" is, of course, more than just a concept. It is the law based on statutes, decisions, rules, and tariffs. One paragraph later, the Commission amplifies and clarifies it language to on that point: "The problem with VNXX is that it disregards the concept of LCAs *and avoids the compensation regime that the state has established for calls between LCAs*."[9] (*Id.* at 26, lines 7-9; emphasis added). This is a clear

[8] *Id.* See also, Qwest's Application for Rehearing filed July 19, 2006.

[9] The Commission repeated this point again, when it stated that "VNXX is a departure from the historic method to provision of service." Order 68817 at 26, lines 27-28.

conclusion by the Commission that VNXX is inconsistent with binding call rating standards.[10]

The Commission described its decision in the *AT&T Arbitration* decision in these terms: "[W]e declined to alter historical practice of rating calls without a more thorough investigation. We continue to believe that it is not good public policy to depart from our historical form of intercarrier compensation *based on the record before us*."[11] (*Id.* at 28, lines 10-13). Based on the same logic, the Commission "decline[d] to alter a long-standing regime for rating calls. Level 3 proposes the use of VNXX arrangements that undermine that compensation regime" (*Id.* at 28, lines 25-26; emphasis added). Following that analysis, the Commission's ruling was clear: "Thus, we find that Level 3 *should not use* VNXX to provide service to ISPs and VoIP providers." (Id. at 28, line 26 to 29, line 1; emphasis added). The Commission defined VNXX and banned it as inconsistent with Arizona call rating rules. Furthermore, the record before the Commission at the time it rendered Decision 68817 has not been supplemented with any additional factual evidence.

Decision 69176 is directly at odds with the clear rulings of Decisions 68817 and 68855. Ironically, the Commission begins its discussion in Decision 69176 by restating its definition of VNXX. In footnote 1, it defines VNXX in language virtually identical to Decision 68817: "VNXX or virtual NXX is an arrangement under which a carrier assigns a phone number to a customer that is not physically located in the rate center or exchange with which that NPA/NXX is associated. The effect is that the call is rated as a local call even though the called party is not physically located in the same local calling area as the calling party." (Decision 69176 at n. 1). Thus, the VNXX definition in both orders is the same.

Yet, in language that is utterly inconsistent with its analysis of VNXX in Decision 68817, the Commission's ruling on VNXX changes dramatically:

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[10] Arizona call rating rules were addressed at length in Qwest's Post Hearing Brief (November 18, 2005) at 18-22. Level 3 did not provide a substantive response to that discussion in its reply brief.

[11] Because the Commission denied Qwest's request to present additional evidence, that record remains exactly the same as when Decision 68817 was rendered..

> Ultimately, although disapproving of VNXX arrangements pending its generic investigation, in adopting the "FX-like" interim solution, the Commission determined that at least temporarily, until the Commission could systematically and thoroughly study the implications of the use of VNXX arrangements, *Level 3 should be allowed to continue using VNXX type arrangements*, but would be required to pay for transport of traffic outside the local calling area of the originating caller. (Decision 69176 ¶ 22; emphasis added).

This language cannot be reconciled with the still-effective language of Decision 68817 that unqualifiedly condemns and bans VNXX. Because there is nothing in Decision 68817 that could conceivably be read to suggest that the intent of the Commission was to allow Level to "continue using VNXX type arrangements," the Commission has adopted contradictory positions that cannot be harmonized. The Commission has condemned and banned VNXX and, at the same time, allowed "VNXX type arrangements" to continue. Moreover, Decision 68817 is clear that VNXX violates Arizona call rating rules. That being the case, it is unlawful as a matter of law to allow the continuation of service that the Commission, in the same order, has concluded "*avoids the compensation regime that the state has established for calls between LCAs.*"[12] (Decision 68817, at 26, lines 7-9; emphasis added). It is axiomatic that a state regulatory agency must follow and apply its own rules.[13] One of the Commission's rules is R14-2-1305(A), which states that "the incumbent LEC's *local calling areas and existing EAS boundaries* will be utilized for the purpose of classifying calls as local, EAS, or toll *for purposes of intercompany compensation.*" (Emphasis added). Yet, by its own terms, paragraph 22 of Decision 69176 states that the Commission has decided to allow a service that ignores LCA boundaries that the Commission has also concluded violates the law. Thus, the Commission ignored its own finding in Decision 68817 that "[e]vidence of how such a[n

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[12]The Commission repeated this point again, when it stated that "VNXX is a departure from the historic method to provision of service." Decision 68817 at 26, lines 27-28.

[13] Arizona law is clear that "an agency must follow its own rules and regulations; to do otherwise is unlawful." *Clay v. Arizona Interscholastic Ass'n*, 161 Ariz. 474, 476, 779 P.2d 349, 351 (1989); *Tiffany v. Arizona Interscholastic Ass'n*, 151 Ariz. 134, 139, 726 P.2d 231, 236 (Ariz. App. 1986) ("It is hornbook law that an administrative board must follow its own rules and regulations. . . .[T]he obligation of such a body to follow its own rules and regulations is founded in principles of administrative law.").

FX-like] scheme might work, or if it could work, was not offered at the docket." (Decision 68817 at 29). Given that fact, and the fact that no further evidence was taken or allowed, it is logically impossible for the Commission to meet its duty of making the factual findings essential to support its ruling.[14] In so ruling, the Commission has erred.

B. Decision 69176 is Unlawful Because it Contravenes and Reverses the Distinction Between VNXX and FX in Decision Nos. 68817.

Decisions 68817 and 68855 unambiguously order Level 3 to cease and desist from the use of VNXX. VNXX was correctly described in the Decision 68817.[15] FX was described correctly in Decision 68817.[16] The Commission concluded that FX and VNXX are not the same. Having clearly distinguished FX from VNXX, in Decision 68817 the Commission went on to direct the parties to devise an interim solution relating to what the Commission named "FX-like traffic." Now, however, in Decision 69176, the Commission concludes that VNXX need not be discontinued, and replaced by some other network design. Decision 69176 concludes that in requiring an "FX-like" interim solution, the Commission did not mean the "FX-like" solution should be comparable to FX. Decision 69176 concludes, in effect, that Level 3 does not need to change anything about its network. According to Decision 69176, the Commission meant that

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[14] *See Cauley v. Industrial Comm'n*, 13 Ariz.App. 276, 279, 475 P.2d 761, 764 (1970) ("[T]he Commission has failed in its final award to give the parties or this Court sufficient findings of fact upon which we can make a decision"). The Ninth Circuit ruled that the standard of review of factual findings under Section 252(e)(6) is whether the decision is "supported by substantial evidence." *Peevey,* 462 F.3d at 1150, *citing Pacific Bell v. Pac-West Telecomm*, 325 F.3d 1114, 1131 (9th Cir. 2003). Given the Commission's statement that "[e]vidence of how such a[n FX-like] scheme might work, or if it could work, was not offered at the docket," it is clear, based on the Commission's own statements, that there is no evidence, let alone "substantial evidence," to support Decision 69176.

[15] "'VNXX traffic' is all traffic originated by the Qwest End User Customer that is terminated to CLEC's End User Customer who is not physically located within the same Qwest Local Caller Area (as approved by the state Commission) as the originating caller, and CLEC's End User is assigned an NPA-NXX in the Local Calling Area in which the Qwest End User Customer is physically located. *VNXX does not include FX.*" (Decision 68817 at 29-30; emphasis added).

[16] "[I]n FX service, the ISP pays for local access and for transport of the traffic to its equipment in a distant LCA." (Decision 68817 at 26-27). That is one aspect of FX service. At the Open Meeting, Qwest identified other key differences which the Commission ignored.

"Level 3 should be allowed to continue using VNXX-type arrangements." (Decision 69176 ¶ 22). In effect, these "VNXX-type arrangements" are equated to "FX-like," because the Commission agreed with the Staff that in ordering an FX-like solution the Commission meant that Level 3 could use VNXX. As stated above, these conclusions render the twice-repeated order that Level 3 discontinue the use of VNXX a complete nullity. However, these conclusions also result in the patently erroneous and illogical conclusion that "FX-like" does not mean "like FX." Further, by blurring together, but without defining, "VNXX-type" arrangements and "FX-like" arrangements, the Commission contravenes and reverses the holdings in Decision 68817 that VNXX and FX are separate and distinct.

C. Decision 69176 is Unlawful Because it Contravenes and Reverses the Commission's Refusal in Decision 68817 to apply ISP Termination Charges to VNXX Traffic.

One of the primary issues arbitrated was whether Qwest must pay the $0.0007 per minute of use rate established in the FCC's *ISP Remand Order* for calls made to ISPs over VNXX. The Commission did not decide that question in Decision 68817 because the Commission forbade the use of VNXX arrangements:

> Consistent with our understanding of federal law, our existing rules and our holding in the AT&T Arbitration Order, we decline to alter a long-standing regime for rating calls. Level 3 proposes the use of VNXX arrangements that undermine that compensation regime. Thus we find that Level 3 should not use VNXX to provide service to ISPs and VoIP providers. (Decision 68817 at 28-29).
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> ....
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> Because we do not permit the use of VNXX arrangements as Level 3 has proposed them in this case, we do not reach the issue of whether the ISP Remand Order only applies to "local" ISP traffic. (*Id.* at 29).

Now, however, in Decision 69176 the Commission, has arbitrarily reversed itself without explanation. Under Decision 69176 the per MOU rate established in the *ISP Remand Order* for local, non-VNXX traffic to ISPs must be paid by Qwest to Level 3 because the Commission has, without explaining its decision and without a record upon which to base its decision, equated "VNXX-like" and "FX-like." This result is directly contrary to Decision 68817, where

the Commission specifically declined to alter the existing scheme for intercarrier compensation.

D. The Commission's Modification of the Ban Against VNXX, the Imposition of Provisions the "FX-Like Traffic" Scheme, and the Imposition of ISP Terminating Compensation for VNXX Traffic, Each Violates Qwest's Constitutional and Statutory Rights Because These are New Issues and the Commission Refused To Allow Testimony, a Hearing, and Briefing on Them.

Decision 69176 violates Qwest's constitutional and statutory due process rights because it materially adversely affects Qwest's rights and obligations, and substantially modifies (in fact, reverses) previous orders of the Commission, as explained above, without affording to Qwest, the party directly affected thereby, notice, opportunity to present evidence, and to be heard on its legal arguments. As discussed above, Decision 69176 substantially alters the Commission's previous orders.

The Commission did not make any one of the modifications it made in Decision 69176 in a way that comports with even minimal procedural due process standards.[17] The Commission failed to provide notice to Qwest. The Commission did not provide to Qwest the opportunity to present evidence, or to cross examine witnesses in opposition to Qwest's positions. The Commission did not allow Qwest the opportunity to provide legal argument about the changes. Finally, the Commission did not perform a fair value determination for either Level 3 or Qwest as required by Article 15 of the Arizona Constitution prior to establishing intercarrier compensation rates for interexchange ISP traffic.

1. "FX-like traffic."

By the Commission's own admission, the issue of an "FX-like traffic" amendment, and

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[17] *See Curtis v. Richardson*, 131 P.3d 480, 484 (Ariz. 2006) ("Due process entitles a party to notice and an opportunity to be heard at a meaningful time and in a meaningful manner.") (citing Comeau v. Ariz. State Bd. of Dental Exam'rs, 993 P.2d 1066, 1070-71 (Ariz. App. 1999)); *see also Univ. of Iowa Hospitals and Clinics v. Waters*, 670 N.W.2d 432 (Iowa App. 2003) (finding that workers' compensation commission abused its discretion by considering an issue "which was a new issue raised at the time of the administrative hearing," and explaining that, "[u]nder due process principles, notice should inform a party of the issues involved in order to prevent surprise at the hearing and allow an opportunity to prepare.")

the requirement that Qwest pay terminating compensation on such traffic, was not the subject of hearing. Decision 68817 stated:

> Although we disapprove Level 3's use of VNXX, as it has been described in this proceeding, Level 3 should be able to serve customers through FX or an FX-like service. In addition, there *may be* ways Level 3 could use "VNXX-like" arrangements and compensate Qwest for transport (perhaps using a TSLRIC rate) that would alleviate our concerns about intercarrier compensation distorting the market by improper cost shifting. *Evidence of how such a scheme might work, or if it could work, was not offered in this docket, but we would not want to eliminate such compensation scheme and encourage the parties to be creative in creating a "win-win" resolution and present a revised ICA for our approval.* (Decision 68817 at 29; emphasis added).

The Commission correctly states that evidence related to an "FX-like" solution was never presented at hearing. That the term was undefined prior to the Commission's Decision 69176 is clearly demonstrated by the statement in Decision 69176 that '[i]n referring to the interim arrangements as 'FX-like,' the Commission did not intend that such arrangement would be comparable to the FX service being provided by Qwest." (Decision 69176 ¶ 22). The Commission thereby disavowed the scanty evidence of what "FX-like" might mean. The only FX service that was even mentioned in the hearing was Qwest's FX service; thus, the record is devoid of any evidence that could possibly assist the Commission or parties in defining the term—there is certainly nothing of substance in the record that could justify a finding as to what is "FX-like." Thus, a new, and very important, factual issue was raised by the adoption of the Mayes amendment, an issue that the Commission acknowledges was not addressed in the hearing. As a matter of due process, Qwest is entitled to present factual evidence on that issue. By denying Qwest that opportunity, the Decision 69176 violates Qwest's due process rights to present evidence on a critical factual issue.

2. VNXX Distinguished from FX.

Similarly, the only evidence regarding the distinctions between FX and VNXX was entered into the record at the hearing prior to the Commission's adoption of Decision 68817. As noted, that evidence led the Commission to conclude in Decision 68817 that "VNXX does not include FX." Now, without the benefit of any further evidence, the Commission has eliminated

any meaningful distinction by indiscriminately referring Level 3's network scheme as both "VNXX-like" or "FX-like."

3. Liability for Terminating Compensation for VNXX Traffic

Likewise, in Decision 69176 the Commission has, in effect, changed its mind without any new supporting evidence to impose the per MOU rate established in the *ISP Remand Order* for calls made to ISPs using VNXX, because the Commission has equated VNXX with "FX-like." The Commission brushed aside Qwest's request that the Commission consider its decision under both orders in light of *Peevey,* concluding that the effects of *Peevey* can be considered in the generic docket. (Decision 69176 ¶ 25). This is error. As noted in Qwest's exceptions, since the Commission's Order was issued on June 29, 2006, three significant federal circuit court cases have been issued that have addressed the issue of compensation for ISP traffic, one from the D.C. Circuit,[18] one from the First Circuit,[19] and, most important of all, the Ninth Circuit's September 7, 2006 decision in *Peevey*. *Peevey* is directly relevant to the fundamental issues in this case.

Moreover, as described in Qwest's Application for Rehearing from Decision 68817, the law in three circuits clearly established that the scope of the *ISP Remand Order* is limited only to traffic delivered to an ISP located in the same LCA as the caller. A fourth circuit, the Ninth Circuit in *Peevey*, reached the same conclusion in September. Thus, totally aside from the due process issues raised herein, the application of terminating compensation at $.0007 per MOU on non-local ISP traffic is erroneous under the unanimous decisions of four federal circuit courts.

4. Violation of A.R.S. 40-252

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[18] *In re Core Communications,* 455 F.3d 267, 271 (D.C. Cir., June 30, 2006) (finding the *ISP Remand Order* "found that calls *made to ISPs located within the caller's local calling area* fall within those enumerated categories – specifically, that they involve 'information access.'"). (Emphasis added).

[19] . In *Global NAPs v. Verizon New England,* 454 F.3d 91, 99 (2nd Cir., July 5, 2006) ("*Global NAPs II*") ("The ultimate conclusion of the 2001 Remand Order was that *ISP-bound traffic within a single calling area* is not subject to reciprocal compensation.") (Emphasis in original).

These reversals and substantial modifications of the Commission's previous orders not only violate the procedural due process protections of the Constitution of the United States and the Constitution of the State of Arizona, they also violate the statutes applicable to the Commission. A.R.S. 40-252 states as follows:

> The commission may at any time, upon notice to the corporation affected, and after opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision made by it.

The Commission did not issue any such notice; and, despite Qwest's direct request for a hearing and the opportunity to be heard and to introduce evidence (as upon a complaint[20]), the Commission proceeded to issue Decisions 69176, which is therefore unlawful.

For the foregoing reasons, it is clear that Decision 68817 and Decision 69176 are irreconcilable, that the Commission has fundamentally altered its decision, and that its decision to allow VNXX by calling it something else is not based on facts or the law.

E. The Commission's Interpretation of Its Intent In Decision 68817 Is Inaccurate and Unlawful Because it is Arbitrary, Capricious, and Unreasonable.

In Decision 69176, the Commission glosses over its failures to provide procedural due process by characterizing its decisions therein as an explication of the Commission's intent in Decision 68817. Even if full credit is given to that proposition, the explanations stated and the conclusions reached are simply unreasonable. The unmistakable plain meaning of the Commission's earlier decisions do not allow the dramatically different subsequent interpretations of intent. The following table displays the disparate rulings:

[20] The provisions of the statutes regarding complaints before the Commission provide that the party complained of shall be heard in person or by attorney, and may introduce evidence at the hearing; proceedings shall be stenographically reported by a reported appointed by the Commission. A.R.S. 40-247. None of that happened in this phase of the docket despite Qwest's requests to provide additional evidence and an opportunity for a hearing.

PREVIOUS DECISIONS	DECISION 69176
"The problem with VNXX is that it disregards the concept of LCAs and avoids the compensation regime that the state has established for calls between LCAs." (Decision 68817 at 26)	"Ultimately . . . the Commission determined that at least temporarily . . . Level 3 should be allowed to continue using VNXX type arrangements[.]" (Decision 69176 ¶ 22).
"VNXX is a departure from the historic method to provision service." (*Id.*)	
"[VNXX] is different than FX provided by Qwest [.]" (*Id.*)	
"Consistent with our understanding of federal law, our existing rules and our holding in the the *AT&T Arbitration Order*, we decline to alter a long-standing regime for rating calls." *Thus we find that Level 3 should not use VNXX to provide service to ISPs and VoIP providers*." (*Id.* at 28; emphasis added).	
"Traffic exchanged between the parties should be rated in reference to the rate centers associated with NXX prefixes, which are historically associated with the rate center within Qwest's defined local calling areas as determined by the Arizona Commission, of the calling and he called parties. *Unless and until, specifically authorized by the Arizona Corporation Commission, the parties shall not exchange VNXX traffic, as defined herein."* (*Id.* at 29; emphasis added).	
"Within 60 days of the effective date of this Decision, Level 3 shall cease using VNXX " (*Id.* at 82.)	
"Level 3 shall cease and desist from the use of VNXX". (Decision 68855 at 15).	

Decision 69176 does not provide any rationale for the leap it makes from the earlier rulings to ban VNXX to the conclusion that VNXX is allowed, beyond mere speculation that the musings cited from Decision 68817 that "Level 3 should be able to serve its customers through FX or an FX-like service," or that "there may be ways whereby Level 3 could use 'VNXX-like'

arrangements and compensate Qwest for transport (perhaps by using a TSLRIC rate),[21] somehow evidence an intent more certainly that do the twice-stated, direct and unambiguous directives that Level 3 shall cease using VNXX. Further, the fact that the Commission engrafted the VNXX ban upon Decision 68817 by the same Mayes Amendment that directed the parties to implement an FX-like interim solution proves that the Commission could not have intended for VNXX and FX-like to be identical.

F. The FX-like Interim Solution that Relies upon the Concept of a POI does not Comply with Arizona Call Rating Rules.

The ICA language adopted in Decision 69176 appears to rely upon the concept of point of interconnection ("POI") for classifying calls (See Decision 69176, Exhibit A, ¶ 6).[22] As a matter of law, the existence of a POI is irrelevant under the call rating rules in Arizona under which the Commission banned VNXX. As discussed at length in its original brief in this matter, the law of Arizona (as represented by statutes, Commission rules, Commission decisions—*e.g.*, the *AT&T Arbitration Order*—and tariffs) could not be more clear that calls are rated based on the location of customers and not on the basis of the location of a CLEC's equipment or POI. Because Qwest's request to file testimony was denied, it has had no opportunity to address the POI theory, either by presenting factual testimony or through legal briefing.

G. The Virtual Provisions Approved by Decision 69176 are Unreasonable Fictions

As noted above, an actual POI is not sufficient to constitute a local end user customer presence in the LCA for purposes of overturning the longstanding rules distinguishing local vs. long distance. Yet, the language adopted the Commission in Decision 69176 goes even farther, and lets Level 3 elude even that modest requirement. Paragraph 6 of Exhibit A to Decision

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[21] Decision 69176 ¶ 22 (citing Decision 68817 at 29, lines 5-12).

[22] In fact, the new ICA language goes one step farther, to the concept of a "virtual POI," which is simply a euphemism for the fact that there is no POI, but that for purposes of the ICA the parties will "pretend" that one exists.

69176 allows Level 3 to pay for transport to a "virtual POI" in each LCA. This highlights two key facts: (1) that Level 3 will not be required to make any changes to its network and (2) the FX-like interim solution is fictional. Indeed, the entire "virtual" concept is based on the premise that something that does not really exist is treated as though it does. The Commission's explicit endorsement of this fiction, with no supporting reasons given, is erroneous on its face, is unreasonable, and unlawful and without any factual basis.

H. Decisions 68817 and 69176 Result in the Unlawful Application of the *ISP Remand Order* to Calls That Are Not Delivered to an ISP in the Same LCA as the Calling Party.

Decision 68817 and 69176 constitute error insofar as they require Qwest to pay ISP terminating compensation to Level 3 for traffic sent to ISPs over VNXX., as demonstrated by five federal circuit court decisions (including *Peevey*), each of which holds that the scope of the *ISP Remand Order* is limited only to local ISP traffic. *WorldCom, Inc. v. FCC,* 288 F.3d 429, 430 (D.C. Cir. 2002 (the *ISP Remand Order* as applying only to "calls made to internet service providers ("ISPs") located *within the caller's local calling area.*" (emphasis added); *Global NAPs v. Verizon New England,* 444 F.3d 59, 62 (1st Cir. 2006) ("the FCC did not expressly preempt state regulation of intercarrier compensation for *non-local ISP-bound calls.*") (emphasis added); *Global NAPs v. Verizon New England,* 454 F.3d 91, 99 (2nd Cir. 2006) (upholding a Vermont decision banning VNXX, court stated that "[t]he ultimate conclusion of the 2001 Remand Order was that ISP-bound traffic *within a single calling area* is not subject to reciprocal compensation.") (emphasis in original); *In re Core Communications,* 455 F.3d 267 (D.C. Cir., 2006) (reaffirmed the original *WorldCom* decision that defined the *ISP Remand Order* as applying only to "calls made to internet service providers ("ISPs") located *within the caller's local calling area.*"); *Verizon California v. Peevey*, 462 F.3d 1142, 1159 (9th Cir. 2006) (*ISP Remand Order's* compensation scheme applies only to "local ISP-bound traffic"). There is no contrary authority at the circuit court level.

I. By Refusing to Allow Qwest To Brief the Impact of *Peevey*, the Commission Failed

to Fulfill its Obligation under the Act to Apply Current Federal Law to an Ongoing, Unresolved Dispute, Thus Failing to Properly Apply the Law and Denying Qwest's Due Process Rights.

On September 22, 2006, at a time when the ICA in this matter was still open and unresolved, Qwest requested an opportunity to apprise the Commission of the *Peevey* decision from the Ninth Circuit, a case that is directly on point on several key issues in this matter. Nonetheless, the Commission brushed aside Qwest's request that the Commission consider Decisions 68817 and 69176 in light of *Peevey,* concluding that the effects of *Peevey* can be considered in the generic docket. (Decision 69176 ¶ 25). As noted in Qwest's exceptions, since the Commission's Order was issued on June 29, 2006, and as described in the prior section, three other significant federal circuit court cases have been issued in 2006 that have addressed the issue of compensation for ISP traffic. Most importantly, however, is the Ninth Circuit's decision in *Peevey*. The Commission's role in this docket is to apply federal law. However, the Commission has ignored binding law, and thus has failed to properly fulfill its delegated function under the Act. Among other things, *Peevey* ruled that:

(1) The compensation regime of the *ISP Remand Order* applies only to "local ISP-bound traffic" and does "not affect the collection of charges by ILECs for originating interexchange ISP-bound traffic" 462 F.3d at 1159. Thus, as a matter of federal law the *ISP Remand Order's* compensation scheme applies only to "local ISP-bound traffic." Thus, Decision 69176's requirement that Qwest pay Level 3 terminating compensation under the *ISP Remand Order* for non-local ISP traffic is plainly unlawful. This was one of the issues raised in Qwest's Application for Rehearing from Decision 68817, in its Motion for Additional Briefing, and is a central issue relating to the lawfulness of Decision 69176.

(2) The Ninth Circuit affirmed that, as a matter of federal law, "VNXX traffic interexchange traffic." As noted above, by adopting the contract language in Exhibit A to Decision 69176, the Commission has unlawfully required Qwest to pay terminating

compensation on interexchange ISP traffic for which Qwest has a right to receive compensation.

(3) For purposes of determining whether traffic is VNXX traffic (traffic that is banned under Decisions 68817 and 68855), the relevant end point is where the CLEC's "network ends and the call is picked up by the customer. Since that is the end of [the CLEC's] responsibility for the call, it should also be the relevant end point for purposes of determining whether the call is local of VNXX." *Id.* at 1159. Yet Decision 69176 requires that Qwest pay terminating compensation on traffic that is not local and that is clearly VNXX in nature.

As "delegated federal regulators," state commission must follow binding federal law.[23] Under the Act, Congress delegated several specific and narrowly-defined tasks to state commissions. These tasks, and the state commission's authority to perform them, derive from the Act, not from the state commission's state statutory authority.[24] Thus the Tenth Circuit has ruled that Congress "preempted state regulatory authority over some aspects of local phone service" and has described the state commission's authority on those issues as a federal "gratuity."[25] The Ninth Circuit ruled that "the FCC's implementing regulations . . . must be considered part and parcel of the requirements of the Act."[26] Recently, the FCC preempted

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[23] State commissions are required to make their decisions consistent with the Act, FCC orders like the *ISP Remand Order*, and the federal court decisions that interpret them. Under the federal act, Congress delegated several specific and narrowly-defined tasks to state commissions, including the authority, as in this case, to resolve disputed language in an ICA. The Seventh Circuit has characterized the state commissions as "deputized federal regulators." *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 343-44 (7th Cir. 2000).

[24] *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 343 (7th Cir. 2000) ("*MCI Telecom*") ("authority to act [is] derived from provisions of the Act and not from [its] own sovereign authority"); *see also* Richard J. Pierce, Jr., *Administrative Law Treatise* §14.2 ("An agency has the power to resolve a dispute or an issue only if Congress has conferred on the agency statutory jurisdiction to do so.").

[25] *MCI Telecommunications Corp. v. Public Service Commission of Utah*, 216 F.3d 929, 938 (10th Cir. 2000) ("Thus, with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity.").

[26] *U S West Communications v. Jennings*, 304 F.3d 950, 957 (9th Cir. 2002).

decisions of four state commissions that required an ILEC to unbundle network elements beyond the limits previously established by the FCC. The FCC noted that, "except in limited cases, the [FCC's] prerogatives with regard to local competition supersede state jurisdiction over these matters."[27] Accordingly, state commissions are required to make their decisions consistent with the Act and only have the powers that Congress has unequivocally delegated to them.

The Third Circuit has described the Act's narrowly confined delegation of authority to state commissions as follows:

> Under the Act, there has been no delegation to state commissions of the power to fill gaps in the statute . . . . State Commissions have been given only the power to resolve issues in the arbitration and to approve and reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement.
>
> . . . . If the [state commission's] interpretation conflicts with that of the FCC, the [state commission's] determination must be struck down.[28]

A state commission has no authority, as the Commission has done here, to impose requirements on Qwest that do not exist under the Act or under FCC orders, as interpreted by the federal courts, that implement the Act, such as the *ISP Remand Order*.[29].

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[27] Memorandum Opinion and Order and Notice of Inquiry, *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Services By Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, 20 FCC Rcd. 6830 ¶ 22 (March 25, 2005).

[28] *MCI Telecommunication Corp. v. Bell Atlantic-Pa,* 271 F.3d 491, 516 (3d Cir. 2001). *See also Pacific Bell v. Pac West Telecomm, Inc.,* 325 F.3d 1114, 1126-27 (9th Cir. 2003) ("the authority granted to state regulatory commissions is confined to the role described in § 252—that of arbitrating, approving, and enforcing interconnection agreements. As the Supreme Court noted in *AT&T v. Iowa Utilities Board*, the Act *limited* state commissions' authority to regulate local telecommunications competition. . . . The Act did not grant state regulatory commissions additional general rule-making authority over interstate traffic") (italics in original).

[29] To ensure that state commission determinations adhere to the Act, Congress expressly provided for exclusive review in federal district court. 252 U.S.C. § 252(e)(6). Thus, the United States Supreme Court stated that "[i]f federal courts believe a state commission *is not regulating in accordance with federal policy,* they may bring it to heel." *AT&T Corp. v Iowa Utilities Board*, 525 U.S. 366, 378, n.6 (1999) (emphasis added).

In a seminal United States Supreme Court case that interprets the Act, *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 378, n.6 (1999), the Court noted the fundamental obligation of state commissions to regulate "in accordance with federal policy." In this case, the federal circuit court that directly governs the Commission has ruled on several critical issues directly relevant to the ICA at issue in this case—in other words, the *Peevey* decision articulates the "federal policy" to which the Supreme Court referred. This is not a situation where, several months after an ICA had been placed into effect, a binding court decision was issued that had to be addressed under change of law provisions in the ICA. *Peevey* was decided before the Commission had reached a final decision on key open issues in the case. The Commission has a responsibility to apply *existing* federal law. By refusing to even consider *Peevey*, the Commission has unlawfully failed to perform its duty under section 252 of the Act.

CONCLUSION

On the basis for the foregoing argument, Qwest respectfully requests that the Commission rehear the issues described above. Qwest further renews its request that the Commission rehear the issues raised in Qwest's July 19 Application for Rehearing.

RESPECTFULLY SUBMITTED this 20th day of December, 2006.

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